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COURT OF CRIMINAL APPEALS
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IN THE COURT OF CRIMINAL APPEALS

FOR THE STATE OF TEXAS

EX PARTE OSCAR MINJARE SANCHEZ	*	**PETITIONER**
	*	
	*	
	*	
STATE OF TEXAS	*	**RESPONDENT**

Trial Court Cause No. 1412036-A
In The 176th District Court
Of Harris County, Texas

Fourteenth Court of Appeals No. 01-18-00139-CR

APPELLANT'S REPLY BRIEF

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IDENTITY OF PARTIES AND COUNSEL

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Presiding Judge:	Hon. Stacey Bond (Trial Judge) Hon. Nikita Harmon (Habeas Judge) 176th District Court 1201 Franklin Houston, TX 77002

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WHETHER THE COURT OF APPEALS EXCEEDED ITS AUTHORITY IN DECLINING TO ADOPT THE TRIAL COURT'S FINDINGS OF FACT THAT WERE UNSUPPORTED BY THE RECORD?

STATEMENT REGARDING ORAL ARGUMENT

This Honorable Court has already decided the issue of oral argument in this matter.

FACTS OF THE CASE

On August 11, 2013, Lt. Gaisle Goudeau was involved in a collision. The vehicle which reportedly hit her did not stop and render aid. (R.R. 2, 29, 34.) The next day Respondent and Tomball Police Capt. Richard Grassi visited Harris County Sheriff's Office Traffic Investigator Arturo Marines. Around the time of the crash, Grassi, the Respondent and two others were in Respondent's vehicle and observed a high-speed pursuit. Capt. Grassi called and texted the Tomball Police Dept., as the pursuit was headed towards Tomball. (R.R. 4 189-197, R.R. 5 64-93.)

Respondent was arrested on or about December 19, 2013 on charges of Failing to Stop and Render Aid. On March 3, 2016, the Respondent was convicted. None of the passengers in Applicant's vehicle were called to testify. Judge Stacey W. Bond sentenced Respondent to ten years community supervision, and thirty days in the Harris County Jail as a condition of probation. (C.R. 67-71).

Applicant's direct appeal was unsuccessful. Cause No. 01-16-00293CR. The mandate issued October 23, 2017. As part of the Writ of Habeas Corpus filed in this

matter, Sharleen Martin submitted an affidavit saying she was available to testify nobody in the Respondent's vehicle was aware of any collision. The primary issue at trial, assuming *arguendo* there was a collision between Mr. Sanchez and Lt. Goudeau, was whether Mr. Sanchez was aware of that collision. R.R. V, 211. Thus, Ms. Martin's testimony went to the very heart of the trial. Lt. Goudeau did not know whether the Respondent was aware of the collision. R.R. 3, pg. 73, lines 16-20.

STATEMENT OF PROCEDURAL HISTORY

The Appellate Court affirmed Respondent's conviction in Cause No. 01-16-00293-CR and issued a mandate. Respondent filed a Writ of Habeas Corpus alleging ineffective assistance due to trial counsel's failure to call necessary defense witnesses. While initially affirming, the First Court of Appeals granted rehearing *en banc,* and the full court remanded the case for an evidentiary hearing due to the insufficiency of the trial court's Findings of Fact. The Court of Appeals "declined to adopt" the trial court's Findings of Fact that were unsupported by the record. See *Ex Parte Sanchez*, No. 01-18-00139-CR. The State's Petition for Discretionary Review was filed on November 11, 2020 and granted February 3, 2021.

SUMMARY OF ARGUMENT

The Court of Appeals did not err in declining to adopt findings of fact that were contradicted by the record. The Respondent showed an uncalled witness was available and helpful to the Defense. The trial court clearly erred by finding Ms. Martin was unavailable to testify, a mixed question of law and fact. Her testimony would have clearly been of aid to the Defense.

Having noted the judge who ruled on the writ was not in a position to make demeanor and credibility determinations as she had not been the judge at trial the Court of Appeals gave the Findings of Fact all the deference they merited under *Guzman v. State*, 955 S.W.2d 85 (Tex.Crim.App. 1997), while *declining to adopt findings of fact that are not supported by the record* – as any court must. Findings that contradict the record are inherently an abuse of discretion.

The State, oddly, does not specify one fact the Court of Appeals erroneously disregarded. It is difficult to ascertain what the State is saying the Court of Appeals failed to pay deference to, as the fact findings supported by the record were followed. Nothing more could be asked.

Respondent continues to believe establishing a police officer is subject to the subpoena power of the District Court is sufficient to show that police officer is

available to testify, else the subpoena power is wholly meaningless. The Defense clearly has the power to compel the attendance of unwilling official witness: the fact that a witness refuses to say they are available cannot mean there is no way to show that witness is available. Showing they are subject to the subpoena power of the court means they are available as a matter of law. Should this Honorable Court agree with that proposition, then Capt. Grassi was also shown to be available as a witness.

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IN THE COURT OF CRIMINAL APPEALS
FOR THE STATE OF TEXAS

EX PARTE OSCAR MINJARE SANCHEZ	*	**PETITIONER**
	*	
STATE OF TEXAS	*	**RESPONDENT**

Trial Court Cause No. 1412036-A
In The 176th District Court
Of Harris County, Texas

Fourteenth Court of Appeals No. 01-18-00139-CR

APPELLANT'S REPLY BRIEF

TO THE HONORABLE JUDGES OF THE TEXAS COURT OF CRIMINAL APPEALS:

Comes now Oscar Minjare Sanchez, Respondent, through counsel on appeal, and files his *Reply Brief*. In support, he would respectfully show the following:

GROUNDS FOR REVIEW NUMBER ONE

WHETHER THE COURT OF APPEALS EXCEEDED ITS AUTHORITY IN DECLINING TO ADOPT THE TRIAL COURT'S FINDINGS OF FACT THAT WERE UNSUPPORTED BY THE RECORD?

ARGUMENT AND AUTHORITIES

A. FACTS OF THE CASE

On August 11, 2013, Lt. Gaisle Goudeau was involved in a collision. The vehicle which hit her did not stop and render aid. (R.R. 2, 29, 34.) The next day Respondent and Tomball Police Capt. Richard Grassi visited Harris County Sheriff's Office Investigator Arturo Marines. At the time of the crash, Grassi, the Respondent and two others were in Respondent's vehicle and observed a high-speed pursuit. Capt. Grassi called and texted the Tomball Police Dept., as the pursuit was headed towards Tomball. (R.R. 4 189-197, R.R. 5 64-93.) Neither was aware of a collision.

Respondent was arrested on or about December 19, 2013 on charges of Failing to Stop and Render Aid. On March 3, 2016, Respondent was convicted at trial. No defense witnesses were called. Judge Stacey W. Bond sentenced Respondent to ten years community supervision, and thirty days as a condition. (C.R. 67-71).

Applicant's direct appeal was unsuccessful. Cause No. 01-16-00293CR. The mandate issued October 23, 2017. As part of the Writ of Habeas Corpus filed in this matter, Sharleen Martin submitted an affidavit establishing she was available to testify that nobody in Respondent's vehicle was aware of any collision. The primary issue, assuming *arguendo* that there was a collision between Mr. Sanchez and Lt.

Goudeau, was whether Mr. Sanchez was aware of that collision. R.R. V, 211. Thus, Ms. Martin's testimony went to the heart of the case. Lt. Goudeau could not say whether Respondent was aware of the collision. R.R. 3, pg. 73, lines 16-20.

A writ was filed in the 176th District Court, alleging trial counsel was ineffective for failing to call as defense witnesses the three individuals who were passengers in Respondent's vehicle. Trial counsel declined to submit an affidavit.

The trial court found none of the three had shown they were available to testify. This was contested on the grounds that all three (one of whom was a police captain) were clearly subject to the subpoena power of the Court, and were thus available to the Defense as a matter of law. Moreover, Sharleen Martin stated had she been asked to testify, she would have done so – and hence, had shown she was available to testify (she could not have "done so" had she not been available.) The Court of Appeals found the trial court's finding was not supported by the record.

The trial court found Ms. Martin's testimony would not have been helpful to Respondent. This was a mixed question of fact and law not based on credibility or demeanor, and accordingly was subject to *de novo* review. The Court of Appeals found this was erroneous.

B. STANDARDS OF REVIEW

Tex.Code Crim.Proc. Article 11.072 establishes procedures for writs of habeas corpus where the applicant seeks relief from an order or judgment of conviction ordering community supervision. Tex.Code Crim.Proc. art. 11.072, § 1. Article 11.072 provides, in relevant part:

> Sec. 6. (a) Not later than the 60th day after the day on which the state's answer is filed, the trial court shall enter a written order granting or denying the relief sought in the application.
>
> (b) In making its determination, the court may order affidavits, depositions, interrogatories or a hearing, and may rely on the court's personal recollection. Sec. 7. (a) If the court determines from the face of the application or documents attached to the application that the applicant is manifestly entitled to no relief, the court shall enter a written order denying the application as frivolous. In any other case, the court shall enter a written order including findings of fact and conclusions of law. The court may require the prevailing party to submit a proposed order.

TEX.CODE CRIM. PROC. ANN. art. 11.072, §§ 6, 7. Courts of appeals generally review a trial court's decision to grant or deny relief on a writ of habeas corpus under an abuse of discretion standard. *Ex parte Mann*, 34 S.W.3d 716, 718 (Tex.App.-Fort Worth 2000, no pet.); *Ex parte Ayers*, 921 S.W.2d 438, 440 (Tex.App.-Houston [1st Dist.] 1996, no pet.). However, "an abuse of discretion review of trial court decisions is not necessarily appropriate in the context of the application of law to facts when the decision does not turn on the credibility or

demeanor of witnesses." *Ex parte Martin*, 6 S.W.3d 524, 526 (Tex.Crim.App.1999); see also *Guzman v. State*, 955 S.W.2d 85, 89 (Tex.Crim.App.1997). Instead, an appellate court must conduct a *de novo* review when "the trial judge is not in an appreciably better position than the reviewing court to make that determination." *Guzman*, 955 S.W.2d at 87; see also *Mann*, 34 S.W.3d at 718. See also *Ex parte Cummins*, 169 S.W.3d 752, 756 (Tex.App. Fort Worth 2005).

When the record contains findings of fact, courts are to defer to the findings *if* the record supports them. See *Ex parte Thompson*, 153 S.W.3d 416, 417-18 (Tex.Crim.App.2005). "However, if the trial court's findings of fact are not supported by the record, then we may reject its findings." *Ex parte White*, 160 S.W.3d 46, 50 (Tex. Crim. App. 2004). Moreover, courts are to review *de novo* mixed questions of law and fact that do not depend on credibility and demeanor. *Johnson v. State*, 68 S.W.3d 644, 652–53 (Tex.Crim.App.2002); *Ex parte Zantos-Cuebas*, 429 S.W.3d 83, 87 (Tex. App.—Houston [1st Dist.] 2014, no pet.). In a case in which the trial court judge did not preside at trial, as herein, and in which there were no live witnesses, this would cover all mixed questions of fact and law, as the trial court judge could make no credibility or demeanor judgments.

C. THE FACTS FOUND BY THE TRIAL COURT

The State does not identify what specific facts the Court of Appeals rejected. In fact, many of the things the State complains of are included not the trial court's factual findings, but were either mixed questions of fact and law or Conclusions of Law.

The first example would be the Court of Appeals finding that Sharleen Martin had established she was available to testify. Clerk's Supplemental Record, 8. Of course, conclusions of law are reviewed de novo, as are mixed questions of law and fact not based on credibility and demeanor. *Guzman, supra*; *Ex parte Zantos-Cuebas, supra.* Additionally, the Court of Appeals conclusion that Ms. Martin's testimony would not have aided the Respondent is stated by the trial court as a Conclusion of Law. Clerk's Supplemental Record, 8. It is clearly a mixed question of law and fact.

Finally, the Court of Appeals noted there was no evidence as to trial counsel's strategy. This did not contradict anything in the trial court's Findings of Fact and Conclusions of Law. The Court of Appeals correctly remanded the matter for the Trial Court to address this gaping hole in the Findings of Fact and Conclusions of Law signed by the trial court.

D. REMAND FOR ADDITIONAL FINDINGS

The Court of Appeals properly remanded this case for additional findings of fact, as was appropriate. While noting that "it still may be that defense counsel's representation was not deficient," the Court of Appeals made no judgment as to the *preponderance of the evidence* on that point. The Court of Appeals deemed they could not make any judgment without further findings of fact from the trial court.

The State complains, without authority, that while an appellate court can send a case back for *initial* findings of fact, the Court of Appeals cannot remand a case for *additional* fact findings. This, of course, is contrary to law and logic. When an essential fact is unaddressed, as in this case, the Court of Appeals can certainly remand the case for fact findings on that particular issue. This is not an unusual situation. The Texas Rules of Appellate Procedure 43.6 and 44.4 authorize, if not mandate, an appellate court to abate for further findings and conclusions when the findings prepared by the Trial Court are inadequate. Tex.R.App. P. 43.6 (authorizing court of appeals to make appropriate orders that law and nature of case require), 44.4 (directing court of appeals to have trial court correct remedial error).

E. SUMMARY

The Trial Court's actual pure findings of fact were not questioned. In fact, the only parts of the trial court's Findings of Fact and Conclusions of Law the Court of Appeals declined to adopt were mixed questions of fact and law. To the extent that these were at all reliant on fact findings, they were at the very minimum mixed questions of fact and law not relying on credibility or demeanor. As such, the Court of Appeals owed them no deference.

It would appear the State is arguing that a Court of Appeals cannot question a trial court's findings of fact that flatly contradict the record. They do not deny that the trial court's findings were unsupported by the record. The Court of Appeals would, by this logic, have no way to challenge findings of fact and conclusions of law that were filed in the wrong case and completely contradicted the record. This would be a plain absurdity. Findings of Fact that are not supported by the record are *per se* an abuse of discretion. And in this case, the record shows no unalloyed findings of fact were rejected by the Court of Appeals, but only mixed questions of law and fact that the Court of Appeals was entitled to decide *de novo*.

In such a situation, the Court of Appeals did exactly what they must: send the Findings of Fact and Conclusions of Law back to the trial court to correct them, and

address whatever omissions exist. It is particularly relevant that the omissions complained of herein by the Court of Appeals would not have been relevant if not for the Trial Court's erroneous judgment as to mixed questions of law and fact. (Findings of Fact 11 and 12, Conclusions of Law 2-5.) In light of these corrections, the Trial Court was entitled to the first "bite at the apple" on the issues of the trial lawyer's culpability.

F. IMPROVIDENT REVIEW

This Honorable Court should dismiss this cause as review was improvidently granted. The Court of Appeals did not "decide facts" in this case, as the Petitioner claims. It decided mixed questions of fact and law that were entirely within its purview. The findings of the trial court the Court of Appeals rejected were mixed questions of fact and law. All pure fact questions in the Findings of Fact (Findings 1-10) were unquestioned by the trial court. Findings of Fact 11 and 12 were mixed questions of fact and law. Thus, this Honorable Court has been positively misled by the State into granting review.

If the cause is not dismissed as review was improvidently granted, it should be affirmed. Courts of Appeal have not just the right but the duty to review *de novo*

mixed questions of law and fact not based on credibility and demeanor. Moreover, they have the prerogative to send a case back for additional findings based on their *de novo* review of such questions, when issues that were previously deemed irrelevant have been shown to be relevant. The Petitioner has not identified a single instance of an unalloyed fact finding, supported by the record, being rejected by the Court of Appeals herein – nor can they, as none exist. The trial court's erroneous conclusions necessitate remand for new, reliable findings of fact and conclusions of law.

CONCLUSION AND PRAYER FOR RELIEF

The Court of Appeals properly examined the trial court's Findings of Fact and Conclusions of Law against the record. A Court of Appeals is obligated to determine whether a Trial Court's Findings are supported by the record. Because here they were not, the Court of Appeals properly performed their role. Accordingly, the burden falls to this Honorable Court to either dismiss this appeal as improvidently granted, or affirm.

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CERTIFICATE OF SERVICE

I certify that on March 26, 2021 a true and correct copy of the above and foregoing *Petitioner's Reply Brief* was properly mailed on this day to:

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Houston, TX 77002

State Prosecuting Attorney's Office
P.O. Box 13046
Austin, Texas 78711

/s/ Clay S. Conrad
Clay S. Conrad

CERTIFICATE OF COMPLIANCE
(Texas Rule Appellate Procedure 9.4(i)(3))

I certify that this document brief/petition was prepared with Microsoft Word, and that, according to that program's word-count function, the sections covered by T.R.A.P. 9.4(i)(1) contain 2108 words.

/s/ Clay S. Conrad
Clay S. Conrad

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